

July 10, 2023

Sent via Email and FOIA Online

National Freedom of Information Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, D.C. 20460
(202) 566-1677
hq.foia@epa.gov

Re: FOIA Request for Information Related to the May 5, 2023 fire at Shell Deer Park Facility in Deer Park, Texas

Dear Freedom of Information Officer:

Earthjustice submits this request for records (the “Request”) to Region 6 of the U.S. Environmental Protection Agency (“EPA Region 6”) on behalf of Texas Environmental Justice Advocacy Services (“t.e.j.a.s.”) in accordance with the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of the U.S. Environmental Protection Agency (“EPA” or the “Agency”), 40 C.F.R. Part 2. The purpose of the Request is to obtain records relating to the fire that occurred on May 5, 2023 at the Shell Deer Park Facility (the “May 5 fire”), owned by Shell Chemical LP and located at 5900 Highway 225, Deer Park, TX 77536. *See* “Air Emissions Event Report Database Incident 400010,” attached as Exhibit 1.

Your prompt response pursuant to the requirements of FOIA, 5 U.S.C. § 552(a)(6)(A), is appreciated.

DEFINITIONS

T.e.j.a.s. seeks the unredacted records listed below. “Unredacted” means that we are seeking full disclosure of all information in the requested record. If you determine that you cannot disclose all of the information contained in a particular record because certain information is covered by a FOIA disclosure exemption, we request a copy of the record with redactions of only the information that you have determined to be properly withheld and an explanation of the basis for your determination.

“Records” means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, emails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, calendar entries, meeting agendas, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. The term “records” as used above also includes any personal email messages, telephone voice mails or text messages, and internet ‘chat’ or social media messages, to the full

extent that any such messages fall within the definition of “agency records” subject to FOIA.¹ “Records” also includes any attachments to such documents or information.

The use of the term “EPA Region 6 staff” shall refer to any person employed by or working on behalf of EPA Region 6 as a permanent employee, temporary employee, independent contractor, intern, fellow, or volunteer.

The use of the term “Coast Guard staff” shall refer to any person employed by or working on behalf of the U.S. Coast Guard as a permanent employee, temporary employee, independent contractor, intern, fellow, or volunteer.

The use of the term “NOAA staff” shall refer to any person employed by or working on behalf of the U.S. National Oceanic and Atmospheric Administration as a permanent employee, temporary employee, independent contractor, intern, fellow, or volunteer.

The use of the term “TCEQ staff” shall refer to any person employed by or working on behalf of the Texas Commission on Environmental Quality as a permanent employee, temporary employee, independent contractor, intern, fellow, or volunteer.

The use of the term “TXGLO staff” shall refer to any person employed by or working on behalf of the Texas General Land Office as a permanent employee, temporary employee, independent contractor, intern, fellow, or volunteer.

The use of the term “Harris County staff” shall refer to any person employed by or working on behalf of the government of Harris County, Texas as a permanent employee, temporary employee, independent contractor, intern, fellow, or volunteer.

The use of the term “outside party” or “outside parties” shall mean any person not employed by or working on behalf of EPA Region 6.

RECORDS REQUESTED

In accordance with FOIA, please provide us with the following records. The time period covered by these requests is May 5, 2023 until the date of your response to this request.

1. All communications related to the May 5 fire internal to EPA Region 6 or between EPA Region 6 staff and outside parties including, but not limited to, Coast Guard staff, NOAA staff, TCEQ staff, TXGLO staff, and Harris County staff.
2. All other records related to the May 5 fire generated, collected, compiled, or received by EPA Region 6 or EPA Region 6 staff, including monitoring data; monitoring locations

¹ Per EPA records management policy, electronic messages such as text messages are agency records, which must be preserved and made accessible under FOIA. *See* U.S. Env'tl. Prot. Agency, Records Management Policy (2020) at 4, https://www.epa.gov/system/files/documents/2021-08/records_management_policy.pdf. Therefore, a production of responsive records must include records using messaging services.

and protocols; and all other data and records related to chemical releases to and exposure from air, water, and soil in connection with the May 5 fire.

3. All lists and other records identifying chemicals that are stored or used at the Shell Deer Park Facility, located at 5900 Highway 225, Deer Park, TX 77536.

We prefer to receive documents in electronic format. To the extent practicable, we seek electronic copies of the above documents in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (agency shall provide records in any form or format if the record is readily reproducible in that form or format).

If you claim that any of the requested records are exempt from mandatory disclosure, we request that you:

1. Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
2. State the FOIA exemption you claim applies to each record or portion of a record you are withholding or redacting;
3. State with particularity the reason why such exemption is applicable;
4. Exercise your discretion to release such records notwithstanding the availability of a basis for withholding **or** examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information that is exempt from disclosure and provide us with a copy of each record with only the information exempt from disclosure redacted.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552, we request a waiver of fees that EPA would otherwise charge for searching and producing the records described above, because this Request satisfies both fee waiver requirements. FOIA provides for fee waivers when: (1) “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government”; and (2) disclosure “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see* 40 C.F.R. § 2.107(l)(1).

I. THE REQUEST IS IN THE PUBLIC INTEREST

To determine whether a FOIA request meets the first prong of the fee waiver requirement, EPA analyzes four factors: (i) the subject of the request; (ii) the informative value of the information to be disclosed; (iii) the contribution to the public’s understanding of the subject; and (iv) the significance of the contribution to the public’s understanding. *See* 40 C.F.R. § 2.107(l)(2)(i)–(iv).

a. The Requested Records Concern the Operations or Activities of the Federal Government

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government.” 40 C.F.R. § 2.107(l)(2)(i). The Court of Appeals for the District of Columbia inquires whether the requested information would “shed light on ‘the operations or activities of the government.’” *Cause of Action v. FTC*, 799 F.3d 1108, 1115 (D.C. Cir. 2015). The requested records will “shed light” on EPA Region 6’s activities in monitoring and responding to the environmental effects of the May 5 fire, which is a critical function of EPA’s regional offices. The Department of Justice notes that “[e]ven records submitted to the government have at times been found to reflect government activity.” *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers* at 25 (2020), <https://www.justice.gov/media/1091946/dl?inline>. Records generated by or submitted to EPA Region 6 in relation to the May 5 fire inform or are part of EPA’s response and reflect “the operations or activities of the Federal government.” 40 C.F.R. § 2.107(l)(2)(i).

b. Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities

The second factor EPA considers in determining whether a fee waiver is appropriate is whether disclosure of the requested records is “likely to contribute to an understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii) (internal quotation marks omitted). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding” of government operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). Disclosure of the requested information will enable the public to better understand the federal government’s role in responding to the May 5 fire, including how it monitors and responds to environmental and human health hazards that may have resulted from the May 5 fire. The information will also help the public understand the data on which the government is basing its response strategies and the ways in which it is coordinating with other federal, state, and local authorities.

c. Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons

EPA next considers whether disclosure of the requested records will contribute to a broad “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request. *Id.* In evaluating a fee waiver request, EPA considers the “requester’s expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.*

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(l)(2)(iii). The Court of Appeals for the D.C. Circuit has clarified that FOIA does not require “a requester to show an ability to convey the

information to a ‘broad segment’ of the public” but only to “a reasonably broad audience of persons interested in the subject.” *Cause of Action*, 799 F.3d at 1116 (quoting *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (1994)). The requested information is of significant interest to the communities surrounding the Shell Deer Park Facility who have been and will be impacted by any hazardous chemical releases resulting from the May 5 fire. These communities have an ongoing interest in understanding the risks associated with the facility’s operations and government authorities’ responses to facility emergencies.

T.e.j.a.s. has the “ability and intention to effectively convey [this] information” to “a reasonably broad audience of persons interested in” the May 5 fire and ongoing operations at the Shell Deer Park Facility. 40 C.F.R. § 2.107(l)(2)(iii); *Cause of Action*, 799 F.3d at 1116. T.e.j.a.s. is a nonprofit organization with a focus on protecting communities surrounding the Houston Ship Channel from threats posed by petrochemical plants and other industrial facilities in the region by providing its volunteers, supporters, and other community members the tools to create sustainable, environmentally healthy communities. It does so by educating its constituents about the sources and extent of chemical pollution that threatens their health and wellbeing, including pollution from fires, explosions, spills, releases, and other chemical disasters at industrial facilities in the region.

T.e.j.a.s. has tools and practices in place to share information obtained from the requested records with the general public and especially the communities interested in the information pertaining to the May 5 fire, including email communications and social media posts that t.e.j.a.s. shares with a community of almost 5,000 supporters and followers. T.e.j.a.s. has already used its social media platform to share information about the May 5 fire with the public. In addition, t.e.j.a.s. staff and volunteers respond to direct inquiries from community members seeking information about the May 5 fire and other chemical facility incidents in the region.

Additionally, t.e.j.a.s. developed a web-based tool, EyeAlerta, with the Natural Resources Defense Council to improve its ability to monitor health threats associated with facility incidents and other industrial pollution and educate the community accordingly. Residents in the Houston area can use EyeAlerta to document signs of pollution, report symptoms, and record the location of incidents. Further, t.e.j.a.s. engages in extensive advocacy to EPA to protect workers and fenceline community members from industrial pollution, including pollution resulting from facility fires and other excess emission events. T.e.j.a.s. intends to continue these activities, which would be informed by the information it obtains from this FOIA request.

d. The Information Requested Will Contribute Significantly to Public Understanding of Government Operations or Activities

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all of the information contained therein, through EPA's website or internet searches. Indeed, it is not even possible for the public to ascertain the universe of information in EPA's possession that is responsive to the Request. The public's understanding of the government's actions regarding the May 5 fire will "be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv).

II. T.E.J.A.S. HAS NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because t.e.j.a.s. does not have a commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(3). As federal courts have held, FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

T.e.j.a.s. is a 501(c)(3) nonprofit organization, and it does not have any "commercial interest that would be furthered by the requested disclosure" of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of t.e.j.a.s.'s mission to inform the public about the May 5 fire, the impact of that incident and others like it on public health and the environment in the Houston Ship Channel region, and the role of EPA Region 6 and other agencies in monitoring and responding to such incidents.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us to inform us of the basis for your decision and provide an estimate of the fees that would be incurred for responding to this request.

REQUESTS REGARDING RECORD DELIVERY

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply "must . . . indicate within the relevant time period the scope of documents [EPA] will produce." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 182 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information.

Please also produce the records on a rolling basis; at no point should EPA's search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email to kobrien@earthjustice.org and tejascomms@gmail.com.

If you have questions about this Request or if the responsive records are voluminous, please contact me at kobrien@earthjustice.org or (212) 284-8036, to discuss the proper scope of this Request. Thank you for your assistance.

Sincerely,

/s/Katherine K. O'Brien

Katherine K. O'Brien

Senior Attorney

Earthjustice

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